

NUGROHOWATI (Migration) [2020] AATA 3488 (30 June 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs WENNY NUGROHOWATI

CASE NUMBER: 1727450

DIBP REFERENCE(S): BCC2016/1902828

MEMBER: Grant Chapman

DATE: 30 June 2020

PLACE OF DECISION: Adelaide

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa

Statement made on 30 June 2020 at 8:01pm

CATCHWORDS

MIGRATION – Partner (Temporary (Class UK)) visa – Subclass 820 (Spouse) – de facto partner – relationship ceased and sponsorship withdrawn – non-judicially determined claim of family violence – verbal and psychological abuse – statutory declarations by applicant and relevant professionals – opinion of independent expert – not family violence but arguments and anxiety about termination of partnership – procedural fairness – video-conferencing and cultural differences – two adverse letters from sponsor – expert’s opinion properly made – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65, 359A
Migration Regulations 1994 (Cth), rr 1.21, 1.22, 1.23(1B)(b), 1.24, 1.25(2), Schedule 2, cl 820.211(2)(a), (8), (9), 820.221(3)(a), (b)(i)

CASE

Maman v MIAC [2011] FMCA 462

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 30 October 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, Wenny Nugrohowati, applied for the visa on 31 May 2016 on the basis of her relationship with her sponsor, Glyn Edwards. At that time, Class UK contained Subclass 820. The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.820.211 and 820.221 which require that at the time of application and decision, the applicant to be the spouse or de facto partner of the sponsor, unless the relationship has ceased and certain circumstances exist. These include that the applicant, or a member of the family unit, has suffered family violence committed by the sponsor: cl.820.211(8) or (9) and 820.221(3)(a) and (3)(b)(i). The applicant claims this occurred in this case.
4. On 30 October 2017, the delegate refused to grant the visa on the basis that the applicant did not meet cl.820.211(2)(a) because the information and evidence provided was insufficient to demonstrate that the applicant was the de facto partner of the sponsor, as defined under section 5CB of the Migration Act.
5. The Tribunal notes that at the time of the Departmental delegate's decision, the sponsor had not withdrawn his sponsorship, nor had the applicant lodged any claim regarding family violence.
6. The applicant appeared before the Tribunal on 20 August 2019 to give evidence and present arguments. The Tribunal also received oral evidence from Dana Cartmill, a social worker who had provided a Statutory Declaration in relation to the applicant's claim regarding family violence; EdwinTjia, Darwin taxi driver; Dr Glyn Edwards, the former sponsor of the applicant; Kevin Edwards, the applicant's employer; and Loan Danh, the applicant's former employer. The Hearing was conducted by videoconference. The Hearing was conducted in the Indonesian and English languages with the assistance of an interpreter.
7. Consequent on the applicant challenging the validity of the Independent Expert's Opinion regarding family violence, the applicant appeared before the Tribunal on 19 June 2020 to give evidence and present arguments. By mutual agreement between the Tribunal and the applicant, in the context of the COVID-19 epidemic, the Hearing was conducted by teleconference. The Hearing was conducted in the Indonesian and English languages with the assistance of an interpreter.
8. The applicant was represented in relation to the review by her registered migration agent Felix Carao of Allskills Recruitment and Migration Services Pty Ltd. The representative attended both Tribunal Hearings.
9. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. In the present case, the applicant claims the relationship with Dr Glyn Edwards, the visa sponsor, has ceased, and she has been the victim of family violence.
11. In determining whether, in fact, a de facto relationship did exist and has ceased to exist, I considered the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons' commitment to each other, to determine whether there had been a mutual commitment to a shared life together to the exclusion of all others, being a genuine and continuing relationship and that they had lived together or not separately and apart on a permanent basis.
12. On the financial aspects, I found evidence of joint ownership of property and business in Indonesia. On the nature of the household I found evidence that they had lived together for an extended period of time in Indonesia, Malaysia and Australia. On the social aspects of the relationship, I found that they had travelled together and that friends and acquaintances, including those who attended the first Tribunal Hearing as witnesses, had regarded their relationship as genuine. On the nature of the persons' commitment to each other, I found that they had been in a relationship since December 2010, had lived together for the subsequent seven years and drawn companionship and emotional support from each other during that period.
13. I noted an email from the former sponsor to the Department of Immigration and Border Protection, dated 18 January 2018, withdrawing his sponsorship of the applicant. This was supplemented by oral evidence from both the applicant and the former sponsor at the Tribunal Hearing that the relationship had ceased.
14. On the basis of the evidence, the Tribunal is satisfied the applicant and the sponsor were in a partner relationship and that this relationship has ceased. The issue that arises on the evidence in this case is whether the applicant has suffered family violence committed by the sponsor, within the meaning of the Regulations.
15. Under r.1.23 of the Regulations, a person is taken to have suffered or committed family violence if there is evidence tested before a court; or the visa application includes a non-judicially determined claim of family violence, and either the Minister (or the Tribunal on review) is satisfied that the alleged victim has suffered relevant family violence or an opinion of an independent expert has been given that the alleged victim has suffered relevant family violence. Relevant family violence is defined in r.1.21. These regulations, as relevant to this decision, are extracted in the attachment to this decision. The Tribunal notes that the violence, or part of the violence must have occurred during the relationship: r.1.23(3), (5), (7), (12), (14).
16. In the present case the applicant is seeking establish family violence on the basis of a non-judicially determined claim of family violence.

Has a claim of family violence been made under the regulations?

17. Under r.1.23, a visa application is taken to include a non-judicially determined claim of family violence where either a joint undertaking to a court has been made by the alleged victim and alleged perpetrator, or evidence in accordance with r.1.24 is provided.
18. The applicant in this case is seeking to rely on evidence referred to in r.1.24 – namely, a statutory declaration under r.1.25 and evidence of a type and number specified by the Minister for these purposes (see IMMI 12/16)

19. A Statutory Declaration under r.1.25 must be made by the spouse or partner of the alleged perpetrator. If the alleged victim is the spouse or partner, the Statutory Declaration must set out the allegation of family violence, name the person alleged to have committed the relevant family violence and if the *conduct* was not directed at the spouse or partner, name the person to whom it is directed and their relationship with the deponent: r.1.25(2). There are different requirements if the family violence is alleged to have occurred to another person: r.1.25(3).
20. I examined the Statutory Declaration lodged with the Tribunal by the applicant, dated 17 January 2018 and was satisfied that it is consistent with the requirements of r.1.25(2).
21. I examined a Statutory Declaration completed by Dana Cartmill, Senior Social Worker at Casuarina Community Care Centre, Casuarina, Northern Territory, dated 17 January 2018; a Statutory Declaration written by Jey Lamech, Registered Psychologist MAPS, dated 15 January 2018; and a Mental Health Care Plan, dated 17 November 2017, written by Medical Practitioner, Dr Michael Tong and was satisfied that they match the requirements of Instrument IMMI 12/116.
22. Therefore, the evidence presented meets the requirements of r.1.24. As such, a non-judicially determined claim of family violence has been made under r.1.23.

Has the applicant suffered family violence?

23. In assessing the non-judicially determined claim of family violence, I considered the oral evidence of the applicant at the Tribunal Hearing on 20 August 2019. I considered also the oral evidence of the other witnesses at that Hearing and particularly that of Dana Cartmill and the former sponsor, Dr Glyn Edwards. I considered also the Statutory Declarations of the applicant; of Dana Cartmill; of Jey Lamech; and the Mental Health Care plan of Dr Michael Tong.
24. Inadvertently, psychologist Jey Lamech, had emailed to the former sponsor a draft of his Statutory Declaration. Consequently, the former sponsor made written submissions to the Tribunal prior to the first Hearing, taking issue with a number of comments in the draft.
25. Also, the applicant involved the former sponsor in the Hearing as a witness.
26. At the Hearing, the former sponsor told me, as he had done in his written submissions, that he was willing to support the applicant in her bid for an appropriate visa but not as a sponsor or for a spouse visa on the basis of her family violence claim regarding their ceased relationship.
27. At the first Hearing, which lasted for approximately four and a half hours, I spent one and a half hours questioning the applicant on the report of psychologist Jey Lamech and putting to her the details of the former sponsor's comments on the report. I then spent a further three quarters of an hour questioning the former sponsor on the psychologist report and his comments and seeking from the applicant responses to those comments.
28. While, on the evidence before me, I accepted that there had been a series of arguments between the applicant and former sponsor during 2017, there was evidence that these developed as a result of the former sponsor's intent to move from Darwin to Port Macquarie, to be nearer his children and the unwillingness of the applicant to accompany him on that move. Consequently, the former sponsor wanted to end the relationship and sought the transfer to him of some property in Indonesia which was in the name of the applicant but for which he claimed to have provided financial support. The applicant referred to psychological trauma she had experienced as a result of these arguments but also was concerned about

the impact on her of the reaction of her family in Indonesia if they became aware that the relationship had broken down because she said they have a positive attitude towards the former sponsor. There was no evidence from the applicant regarding the perpetration against her of any physical violence. On the basis of the evidence before me, I was not convinced that the psychological trauma experienced by the applicant met the test required by the legislation to sustain a claim of family violence. Furthermore, I had some concerns about the accuracy of the psychologist's report. It referred to the former sponsor's "new love interest" in Indonesia and referred also to the applicant having suffered physical abuse. The former sponsor denied any such relationship and claimed that his contact with the woman concerned related to maintenance work on the properties jointly owned with the applicant. He said also that he had not even been back to Indonesia since arriving in Australia with the applicant in 2016. This claim was confirmed by reference to his official Movement Record, indicating no absences from Australia since arriving in 2016. Reference to the copies of text exchanges between the former sponsor and the woman concerned, which were provided to the Tribunal by the applicant, contained no semblance of romantic exchanges. When I put this to the applicant, in the course of the discussion with the former sponsor, she acknowledged the absence of evidence about any romantic relationship. I found it unsatisfactory that a psychologist would appear to have taken this matter as a fact in his analysis of the possible trauma experienced by the applicant. Furthermore, the applicant had never claimed to have suffered physical abuse. I found it unsatisfactory that a psychologist had made such a claim without any basis in fact.

29. Consequently, having considered all of the evidence before me, I was not satisfied for the purposes of r.1.23 that the applicant has suffered relevant family violence. In accordance with that regulation, the Tribunal sought the opinion of an independent expert. On 31 March 2020, the independent expert provided an opinion that the applicant had not suffered relevant family violence.
30. In section B12 pages 6 to 8, the independent expert's report provided a narrative of her interviews with the applicant relating to the claimed family violence, which included that she is still friends with the (former) sponsor despite his reportedly ongoing negative conduct towards her. It contained a summary of her access to and utilisation of professional help. This included comments from Johanna Sawyer, Aged Care Assessment Team reporting the applicant as telling her that the former sponsor was not physically aggressive towards her but verbally undermining; from Dana Cartmill that the applicant was experiencing high levels of anxiety due to the constant threats from the former sponsor to contact the Department of Immigration and request her deportation to Indonesia; from psychologist Jey lamech identifying three key areas of concern including, the loss of a partner, constant verbal abuse and mental health issues associated with shame, frustration and life purpose, such that the applicant was the victim of Family Violence seen in physical and verbal abuse by the former sponsor; from Dr Michael Tong regarding the mental health care plan referring to acute distress related to relationship problems but which contained no mention of family violence.
31. The independent expert's report included a note that the former sponsor had authored two letters which had been submitted to the Department of Home Affairs. These were the submissions considered in some detail at the first Tribunal Hearing. In relation to these submissions the independent expert concluded that, "While the (former) sponsor's opinion may be influenced negatively by the situation, his outline of the relationship discord is broadly consistent with Ms Nugrohowati's (the applicant) and further illustrates the issue of concern here is related to conflict resulting from the termination of the partnership and the associated distribution of assets."
32. In section 13, pages 8 and 9, the report summarises the incident as described at part B12 as psychological abuse and in the Nature of the conduct section ticks the "Neither actual nor threatened" box. In answering the question, "In the IE's opinion, did the conduct in the

incident cause the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own well-being or safety, the report ticks the “No” box. In explaining this opinion, on page 9, summarising, the report says the applicant described the relationship as becoming increasingly unstable during 2017 and 2018 with the couple engaging a mutual discord; but the (former) sponsor wanted to terminate the relationship and obtain full ownership of a property which he used to bargain with the applicant about her visa application. The report found that the applicant did not report being scared of the former sponsor but was worried about termination of the relationship and would have no money or social supports to assist her and did not experience behaviours in response to the (former) sponsor’s conduct that would be considered consistent with an anxiety response.

33. The report concluded that “based on information available, it is concluded that the sponsor’s conduct did not cause Ms Nugrohowati to reasonably fear for, or to be reasonably apprehensive about, her well-being or safety. Indeed, Ms Nugrohowati said that she has maintained a friendship with the sponsor despite him reportedly continuing to verbally abuse her. That would add further weight to the argument that Ms Nugrohowati was not anxious about the behaviour perpetrated by the sponsor, but what such behaviour reflected – namely his motivation to terminate the partnership.”
34. Similar comments were made in the report’s concluding section “Reasons for my decision” on pages 13 and 14, which concluded “For these reasons it is concluded that the (former) sponsor’s behaviour did not cause Ms Nugrohowati to reasonably fear for, or to be reasonably apprehensive about, her own safety or well-being. The (former) sponsor’s comments about the nature of the relationship and the last months of the partnership further support that assertion. Given the above, it is my position that Ms Nugrohowati did not experience family violence according to the definition of relevant family violence, outlined in regulation 1.21 of the Migration Regulations, 1994.
35. Above that under the heading: “Independent expert’s opinion” is the statement “Important: The opinion as to whether the alleged victim has suffered ‘relevant family violence’ must be made: - according to the definition of relevant family violence in regulation 1.21 of the *Migration Regulations 1994*, given above; and - by an independent expert, also defined in regulation 1.21. In my capacity as an independent expert, I have assessed the claims of relevant family violence described by the alleged victim and recorded above. In my opinion, relevant family violence that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own personal well-being or safety (ticket relevant box):” after which the independent expert has ticked the box “has not occurred.” The section continues “I am satisfied that the alleged perpetrator’s conduct was (ticket relevant box):” after which the independent expert has ticked the box “neither actual nor threatened,” after which are recorded the “reasons for my decision” described in paragraph 34 above.
36. I note that the above paragraphs 30 to 35 provide only a summary of the independent expert’s report, which should be read in its entirety for anyone wishing to make an appropriate assessment of it. I note also that, on 31 March 2020, the applicant signed the “End of interview acknowledgement” that she was satisfied with the services of the interpreter and that the psychologist gave her a fair and reasonable opportunity to present her case and be heard.
37. The Tribunal sent the independent expert’s report to the applicant, together with the end of interview acknowledgement form, attached to an s.359A letter, on 14 April 2020. The letter specified the relevant information as being the above finding of the independent expert. Consistent with the requirements of s.359A, the letter described the particulars of this information as adverse and if the Tribunal relied on them, it would be the reason, or part of the reason, for affirming the decision under review, why the information was relevant to the review and the consequences of it being relied on in affirming the decision under review. The

Tribunal sought the applicant's response by 24 April 2020. The response was received on that date.

38. The response included a letter from the applicant in which she said she was "in disagreement with Ms Laura Durkin's assessment outcome." In the letter she referred to a number of questions asked by the independent expert and referred to the reports by Jey Lamech and Dana Cartmill, which had been provided to the Tribunal and to the independent expert.
39. A covering letter from the applicant's agent, Felix Carao, summarised the details of the applicant's letter. It referred to the independent expert's opinion and said "We respectfully disagree with the report of the Independent expert (IE) for the following reasons: 1 The Review Applicant (RA) felt that based on the questioning of the IE, that the IE was biased against her. The RA feels that the IE was asking "leading" questions and "putting words in her mouth" and feels that the IE's mind was already made up. 2. The IE failed to take into consideration the effects a difference in cultural backgrounds has on the way the RA and former sponsor analyse and react to confrontational situations. 3. The second interview was conducted via video link which puts the RA at a disadvantage as the IE will not be able (to) actually see the body language and feel the reaction or response of the RA to the questions of the IE. 4. The IE appeared unwell during the second interview. She was constantly coughing and sneezing which the RA feels resulted in loss of concentration and focus on the task at hand. 5. The IE failed to disclose and discuss the contents of the two adverse letters authored by the sponsor so that the RA can be given the opportunity to give her side. In conclusion, based on the above reasons and more importantly to afford the Review applicant procedural fairness, we respectfully request for another face-to-face interview from a different Independent Expert experienced in dealing with family violence issues that take into consideration cultural diversity. We are also requesting a copy of the two letters submitted by the sponsor Glyn Edwards so that the RA can provide her side to the allegations."
40. Consequently, as required by the regulations, the Tribunal conducted a second Hearing on 19 June 2020, as described in paragraph 7 above, because if the validity of the report is contested, this will be a new determinative issue and requires inviting the applicant to another Hearing.
41. I note that where the independent expert opinion concludes the applicant has not suffered relevant family violence, the Tribunal must invite the applicant under s 359A to comment or respond to the opinion. In sending such an invitation to an applicant, the Tribunal is not required to put anything more than the independent expert's opinion itself. However, in order for that opportunity to be meaningful, s 359A may require the Tribunal to refer an applicant's comments back to the independent expert if the independent expert report is based upon material or assertions which the applicant has not seen in which he or she contests.
42. Having considered the applicant's letter and her agent's covering letter it was my general conclusion that they were asking me to conduct a merits review of the Independent expert's report, which is beyond my jurisdiction. However, given the statement in item 5 of the applicant's covering letter described in paragraph 39 above, I had concerns about whether the applicant had been afforded procedural fairness by the independent expert.
43. I noted that the former sponsor exercised their right to refuse the applicant being provided with copies of his submissions to the Tribunal.
44. I note also that to satisfy the requirements of regulation 1.23(1B)(b), an "opinion" must have been one that was formed in accordance with law, including the common law requirement to comply with the rules of procedural fairness. Having been made aware of a possible failure by the expert to provide procedural fairness, I was required to assess whether or not the

applicant had received procedural fairness from the independent expert. This is based on the finding of the Court in *Maman v. MIAC* [2011] upheld by the Full Federal Court on appeal in *MIAC v. Maman* [2012].

45. The Court found that procedural fairness includes putting adverse information considered to be credible, relevant and significant to the applicant for comment and referring matters raised by an applicant in response to a s.359A invitation back to an independent expert for consideration.
46. The Court cases of *Armstrong v. MIBP* (No. 2) [2017], *Gungor v. MIAC* [2011] and *Alameddine v. MIAC* [2010] found that in cases where there is information before the Tribunal is to suggest that the independent expert may not have afforded the applicant procedural fairness or may not have given a valid opinion it would be of practical benefit to the Tribunal's decision-making to take any further steps that may be appropriate for example, referring any concerns back to the expert to consider and to demonstrate consideration of the legal validity of the opinion in the Tribunal's written reasons. If additional material of sufficient materiality, or any truly new evidence arises the Tribunal may need to refer it back to the independent expert. However, new information in the form of submissions may not need to be referred to the expert, particularly where the submissions relate to an issue of which the applicant was aware and had an opportunity to make submissions to the expert. Nor is the Tribunal obliged to refer back representations made by the applicant that do no more than seek a further merits review of the independent expert's decision.
47. Consequently, prior to the second Hearing the Tribunal wrote to the independent expert on 16 June 2020, raising the concern of the applicant regarding procedural fairness, detailing the five specific points raised in the covering letter of the applicant's agent and seeking her response to them. Using the same numbering as in the agent's letter, the independent expert replied as follows on the same day: 1. I am unclear what line of questioning would have caused the applicant to believe I was biased. However, I do not approach any assessment with a sense of the outcome and it would be considered poor and inappropriate practice to do so. With regards to leading questions and/or "putting words in her mouth", I have no recollection of doing so. However, I note that Ms Nugrohowati was expansive in her account and it was often difficult to obtain a clear and concise answer from her. As such, as is my typical practice, I will summarise for an applicant what I believe they have said and ask them to confirm or deny that or make additions and clarifications. I make a particular point in interviews to state that an applicant should not agree with my summary of their last comment if they do not believe I have accurately understood the point they were making. This process of summarising is designed to ensure clarity and that the applicant has been given the best opportunity to express themselves and is not, in my mind, considered leading or a reflection of bias on my part. 2. Due consideration is always given to the different reactions based on culture and gender and the utmost sensitivity is given to understand the cultural issues of each applicant. 3. I have conducted a very large number of assessments via video link with, to my mind, success and I do not believe in this case there was a notable loss of information in terms of behavioural observations, particularly as the initial assessment was conducted in person. While I acknowledge that video link does limit behavioural observation to some extent I'm unclear how that would be applicable in this case in terms of the effect on my opinion. Further, Ms Nugrohowati appeared generally stable in mood throughout the assessment and even jovial at times and she seemed engaged and she advised that she had no concerns about undertaking the second assessment by video link. 4. If there was concern that my health may affect an assessment, including my ability to focus, I would not undertake the assessment. That was not the case during this assessment and I dispute there being any effect on my ability to focus that day. Moreover, I note that I was not sick on the day of this assessment. 5. From my recollection, the contents of the SP's letters that I had available were put to the applicant at the first interview, as per the requirements of procedural fairness. This is my standard practice in a case where there are obvious

differences between the SP and the PA's accounts, it is unlikely that the information was not put to Ms Nugrohowati. However, I do not currently have access to the file notes, which would enable me to clarify this issue. I will be able to retrieve the file on Thursday and then confirm that the contents of the SP's letters were put to Ms Nugrohowati.

48. In an email of 17 June 2020, the Tribunal thanked the independent expert and asked her to advise also whether she had listened to the audio recording of the first Hearing of this matter. The purpose of the Tribunal in asking this question was that, as described in paragraphs 27 and 28 above, a considerable part of that Hearing was devoted to considering the report of psychologist Jey Lamech in the context of the submissions by the former applicant and questioning the former sponsor and the applicant about those submissions. It was my view that, irrespective of whether the independent expert had disclosed the content of the "two adverse letters," which were the submissions, the applicant had been made fully aware of their detailed content during the first Tribunal Hearing.
49. On 18 June 2020, the Tribunal received a further response from the independent expert as follows: "I can now confirm that the information provided by the SP was put to Ms Nugrohowati. According to my notes, she responded by stating that 1) the SP always denies and never accepts responsibility for his actions against her during the relationship 2) the SP drank alcohol heavily and problematically which may have impacted his recollection 3) the PA stated she was 'not creating a story' and 4) as further evidence of the SP's alleged abuse, the PA indicated even the SP's daughter told the PA that the SP was manipulative and controlling. In terms of the recordings, I reviewed all the information available to me, which included the audio files of the Tribunal's meeting with the PA on 20 August 2019. The recording was reviewed prior to my meeting with the PA."
50. Prior to the second Hearing, the Tribunal received a letter from Dana Cartmill, referring to the forthcoming Hearing, saying that she had been contacted by the applicant regarding the independent expert's report, with the applicant telling her that the independent expert failed to understand and acknowledge her experience of domestic violence. The letter summarised the content of Dana Cartmill's previous Statutory Declaration. A letter was also received from Kevin Thomas, Managing Director of Aerodrome Management Services Pty Ltd, the applicant's employer, dated 9 June 2020 saying that while he had never met the former sponsor, the applicant had told her about his behaviour. Most of this letter was devoted to the applicant's value as an employee and made no comment on the independent expert's report.
51. At the second Tribunal Hearing I explained that it was being held according to the terms of s. 359A/AA in that I would put to the applicant the particulars of information which I regarded as adverse and which, if the Tribunal relied on them, would be the reason, or part of the reason, for affirming the decision under review, why the information was relevant to the review and the consequences of it being relied on in affirming the decision under review.
52. I informed the applicant and the agent that I had sought and received from the independent expert responses to the five key points made in the agent's covering letter in response to the Tribunal's s.359A letter to the applicant. I said that I had done this having considered previous Court decisions. I asked the applicant to provide specifics of her legal challenge to the validity of the independent expert's report, rather than comments which appeared to be in the nature of seeking a merits review of the report, which I explained was beyond my jurisdiction. I suggested that the procedure for the Hearing should be that we work through the five key points made in the agent's covering letter, put to the applicant the response of the independent expert to each of the points and seek any further comment from the applicant. This procedure was agreed by the applicant and her agent.

53. I asked the applicant the basis of her claim against the independent expert described in item 1 of the agent's covering letter, after reading to the applicant the independent expert's response on that item. She said it was because the independent expert asked questions regarding events of several years ago which reminded her of those events and she felt pressure in recalling them and felt humiliated by them. I pointed out that the role of the independent expert was different from that of her own psychologist, in that the independent expert had a forensic role in assessing the applicant's claims, which may result in the applicant being asked questions which she found challenging. The applicant then referred to the findings of the report. I formed the view and informed the applicant that she appeared to be seeking a merits review of the independent expert's report, rather than providing evidence as to its validity.
54. Discussion then turned to item 5 of the agent's covering letter and her knowledge of the sponsor's submissions. Again, I read to her the response of the independent expert on this point and referred to the detailed discussion which had occurred in the first Tribunal Hearing on the submissions. She acknowledged that she was aware of the content of the submissions and that she had discussed them with the independent expert and at the first Tribunal Hearing. However, she said that she did not know that the former sponsor had withdrawn his sponsorship. She then made further comment about the independent expert's conclusions. I told her that she appeared to be questioning the conclusions of the independent expert, with which I acknowledge she disagreed, rather than the process followed by the independent expert. In other words, again she appeared to be seeking a merits review of the Independent expert's opinion rather than evidence regarding its validity under the law.
55. The applicant then made some emotional comments that she had explained to the independent expert about how distressed she had been in relationship and posed the question to me, "Had the former sponsor not been cruel enough?" Again, I reiterated that these comments were going to the merits of the independent expert's opinion, rather than its validity.
56. The applicant then said that the independent expert just wanted to do "a quick job" and "get her money." I pointed out that it was inappropriate for the applicant to cast aspersions on the motivation of the independent expert, which appeared to be based on her disagreement with the independent expert conclusions, rather than any evidence to support those assertions.
57. Discussion then turned to item 2 of the agent's covering letter. Again I read the response of the independent expert to the applicant. The applicant said that the independent expert asked questions but doesn't care and that she answered the questions. The applicant's agent intervened to say that, as an Indonesian, when the applicant heard swear words from the former sponsor, that had a different effect on her than it might on an Australian. The agent claimed that the independent expert had not taken this type of cultural difference into consideration. However, in the context of the response of the independent expert on this matter, there is no evidence before the Tribunal that the independent expert failed to account for this type of cultural difference.
58. On item 3 of the agent's covering letter, I read the response of the independent expert to the applicant. She acknowledged that this was the second opportunity she had to put her case to the independent expert and that the first interview had been conducted face-to-face. I put to her that conducting the second interview by video link was necessary in the context of the coronavirus epidemic, which she accepted. I said that Court decisions confirm the validity of videoconferencing. The applicant said that every time she had to recall a situation during interview, it was difficult for her. She said that it looked like the independent expert was listening and understanding her distress but that her written report did not reflect this.

59. I read to the applicant the independent expert's response to item 4 of the agent's covering letter. The applicant responded, "She's a liar. She wanted to make a quick opinion." I put to the applicant that she was expressing the view that she didn't like the opinion of the independent expert rather than providing reasons for its lack of validity. She said that her social worker Dana Cartmill was the only one upon whom she could unload her frustration about these matters. I told the applicant that her comments appeared to relate to the level of distress she believes she suffered and her disagreement with the independent expert's conclusions regarding that level of distress, rather than whether the independent expert failed to consider her claims to distress which was the issue pertinent to the validity of the independent expert report.
60. The applicant's agent, commenting on the issue of procedural fairness, opined that the independent expert had not considered all of the effects of the difference in cultural backgrounds. However, no evidence was provided to support this claim and again it appeared to me that it related to the merit of the independent expert's report, rather than its validity.
61. In discussion with the applicant and the agent it was agreed that the likely evidence from the other potential witnesses, which the applicant had available to appear before the Tribunal Hearing, would not contribute any additional understanding regarding the validity of the independent expert's report and it was agreed that they would not need to give evidence.
62. Having considered the written responses of the applicant and her agent to the independent expert's report, the responses of the independent expert to the matters raised by the applicant and her agent and having discussed these issues with the applicant and her agent at the second Hearing, I am not satisfied that they have established that the applicant was denied procedural fairness by the independent expert. It is my conclusion that their evidence goes to the merit of the independent expert's report, rather than its validity under the law.
63. Therefore, the Tribunal is satisfied that the opinion is authorised by the Regulations, in that it is provided by an independent expert who is a person suitably qualified to make the assessment, is an employee of an organisation specified for this purpose, and was properly made. Under r.1.23 the Tribunal is required to take as correct an independent expert's opinion, properly made.
64. Accordingly, the Tribunal finds that the applicant is not taken to have suffered family violence committed by the sponsor for r.1.22.
65. Given the above conclusion that the claim of family violence has not been established, the applicant does not meet the requirements of cl.820.221(3)(a) and (b)(i)(A) for the grant of the visa. There is no evidence before the Tribunal that the applicant meets any of the alternative sub criteria. As the applicant does not meet an essential criterion for the visa, the Tribunal must affirm the decision under review.
66. On 30 June 2018, just prior to finalising this Decision, I was alerted by the Tribunal Registry to an email sent to it by the independent expert which in turn forwarded an email she had received from the applicant on 24 June 2020. I note that this email criticised the independent expert inappropriately. It referred to pain, abuse and embarrassment from the applicant's family but reinforced my view that the cause of this was that the former sponsor had withdrawn from the relationship rather than perpetrating family violence consistent with the requirements of the legislation. It served to reinforce my view as expressed in paragraph 63 above.

DECISION

67. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa

Grant Chapman
Senior Member

ATTACHMENT – EXTRACTS FROM THE MIGRATION REGULATIONS 1994

1.21 Interpretation

In this Division:

independent expert means a person who:

- (a) is suitably qualified to make independent assessments of non-judicially determined claims of family violence; and
- (b) is employed by, or contracted to provide services to, an organisation that is specified, in a legislative instrument made by the Minister, for the purpose of making independent assessments of non-judicially determined claims of family violence.

non-judicially determined claim of family violence has the meaning given by subregulations 1.23(8) and (9).

relevant family violence means conduct, whether actual or threatened, towards:

- (a) the alleged victim; or
 - (b) a member of the family unit of the alleged victim; or
 - (c) a member of the family unit of the alleged perpetrator; or
 - (d) the property of the alleged victim; or
 - (e) the property of a member of the family unit of the alleged victim; or
 - (f) the property of a member of the family unit of the alleged perpetrator;
- that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.

statutory declaration means a statutory declaration under the *Statutory Declarations Act 1959*.

violence includes a threat of violence.

...

1.23 When is a person taken to have suffered or committed family violence?

- (1) For these Regulations, this regulation explains when:

- (a) a person (the alleged victim) is taken to have suffered family violence; and
- (b) another person (the alleged perpetrator) is taken to have committed family violence in relation to the alleged victim.

Note Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed — injunction under Family Law Act 1975

- (2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114(1)(a), (b) or (c) of the Family Law Act 1975 against the alleged perpetrator.
- (3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

Circumstances in which family violence is suffered and committed — court order

- (4) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
 - (a) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence; and
 - (b) [...] order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter.

- (5) For subregulation (4), the violence, or part of the violence, that led to the granting of the order must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — conviction

- (6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:
- (a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or
 - (b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.
- (7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — non-judicially determined claim of family violence

- (8) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
- (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
 - (b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.
- (9) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
- (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
 - (b) the alleged victim is:
 - (i) a spouse or de facto partner of the alleged perpetrator; or
 - (ii) a dependent child of:
 - (A) the alleged perpetrator; or
 - (B) the spouse or de facto partner of the alleged perpetrator; or
 - (C) both the alleged perpetrator and his or her spouse or de facto partner; or
 - (iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and
 - (c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:
 - (i) the alleged victim has suffered relevant family violence; and
 - (ii) the alleged perpetrator committed that relevant family violence.
- (10) If an application for a visa includes a non-judicially determined claim of family violence:
- (a) the Minister must consider whether the alleged victim has suffered relevant family violence; and
 - (b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and
 - (c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:
 - (i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and
 - (ii) the Minister must take an independent expert's opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.
- (11) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
- (a) an application for a visa includes a non-judicially determined claim of family violence; and

- (b) the Minister is satisfied under paragraph (10)(b) that the alleged victim has suffered relevant family violence.
- (12) For subregulation (11), the Minister must be satisfied that the relevant family violence, or part of the relevant family violence, occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.
- (13) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
 - (a) an application for a visa includes a non-judicially determined claim of family violence; and
 - (b) the Minister is required by subparagraph (10)(c)(ii) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.
- (14) For subregulation (13), the violence, or part of the violence, that led to the independent expert having the opinion that the alleged victim has suffered relevant family violence must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.